The 1965 Act originally conferred jurisdiction only in respect of offences punishable with imprisonment for a term not exceeding six months or a fine not exceeding $1,000. The 1965 Act was amended in 1984 where the Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984, effective from 1 January 1985, conferred jurisdiction on the Syariah Courts to deal with cases punishable with imprisonment up to three years or a fine up to $5,000 or whipping up to six strokes or the combination of all these. See also *The Malaysian Legal System* (Ahmad Ibrahim and Ahilemah Joned), pp. 58 and 59.

It is our view that the power to impose a prison sentence under section 7 of the Ordinance as opposed to power to award compensation can only be authorized by a federal legislation to be passed in accordance with Item 13 of List IIA of the State List. The Penampang Native Court therefore acted without or in excess of jurisdiction when it imposed the sentence of imprisonment on the appellant.

Appeal allowed.

Solicitors: *Sugumar & Co.*

PUBLIC PROSECUTOR v. KAU JOO HUAT

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 10 October 1987 & 13 February 1988]

[Kuala Lumpur – Supreme Court Criminal Reference No. 7 of 1987]

Criminal Law – Dangerous drugs – Possession of – Whether necessary to prove power of disposal of drug by the accused – Failure to prove accused had custody and control of the drug found in bag – Dangerous Drugs Act 1952, s. 37(d).

In this case a police party, acting on information, raided a room in a hotel and found the respondent and two travelling bags – one green and the other red. They searched the bags. Nothing incriminating was found in the green bag. However, in the red bag they found two pairs of trousers, one of which was black in colour and a black box. Inside the black box was a plastic packet which contained a substance which on analysis by the government chemist was found to be opium. Later in a follow-up operation, a man called Hassan was arrested when he came knocking at the door of the room. The respondent's story was that he shared the room with Hassan and that the red bag belonged to Hassan. The learned President of the Sessions Court found that the black pair of trousers was the type normally worn by exponents of the Malay art of self-defence. The investigating officer also said in evidence that the pair of black trousers was like bersilat trousers.

Nevertheless, the learned President found that the presumption under section 37(d) of the Dangerous Drugs Act 1952 had not been rebutted. On appeal, the learned judge of the High Court, in allowing the appeal, held that the presumption had been rebutted and that the prosecution must prove that the accused had the power of disposal of the drug. The Public Prosecutor then applied for the following question of law to be referred to the Supreme Court: "Whether possession for the purpose of the Dangerous Drugs Act 1952 would require proof of the power of disposal of the drug by the accused?"

Held: (1) the answer to the question is in the negative. The learned judge was wrong to say that the accused must have the power of disposal to support the conviction;

(2) on the facts of this case, it is a matter of grave doubt whether on the totality of the evidence the prosecution has established that the accused had custody and control of the drug found in the bag. The benefit of the doubt should have been decided in favour of the accused;

(3) the learned President of the Sessions Court did not give sufficient consideration, or gave no consideration of all, to the factors raised by the defence but merely brushed aside the defence of non-knowledge. The failure on the part of the learned President had occasioned injustice and the learned judge was right to quash the conviction and sentence.

Cases referred to:

(1) *Toh Ah Loh and Mak Thim* v. *Rex* [1949] M.L.J. 54 (refd).
(2) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237 (refd).
(3) *Public Prosecutor* v. *Ang Boon Foo* [1981] 1 M.L.J. 40 (refd).
(4) *Leow Nghee Lim* v. *R.* [1956] M.L.J. 28 (refd).
(5) *R.* v. *Smith* (1855) 6 Cox 554 (refd).

SUPREME COURT.

Mohd Noor bin Haji Ahmad (Deputy Public Prosecutor) for the applicant.

Phang Ah Hee for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the court): This reference under section 66(1) of the Courts of Judicature Act 1964 reserves the following question for the decision of this court:

"Whether possession for the purpose of the Dangerous Drugs Act 1952 would require proof of the power of disposal of the drug by the accused?"

It is necessary to set out the facts. On 2 August 1981, acting on information, a police party led by a police inspector raided a room in Sentosa Hotel. They found the respondent and two travelling

bags – one green and the other red. They searched the bags. Nothing incriminating was found in the green bag. However, in the red bag they found two pairs of trousers, one of which was black in colour and a black box. Inside the black box was one plastic packet containing a certain substance which on analysis by the government chemist was found to be opium. He was arrested and taken to the police station. In a follow-up operation on 4 August 1981, Hassan bin Ismail was arrested when he came knocking at the door of the room. The respondent's story is that he shared the room with his Malay friend Hassan and that the red bag belonged to Hassan. They planned to go to Sabah but was informed by the travel agent that their flight would be on 4 August 1981 instead of 31 July 1981. Hassan decided to return to his home in Sekinchan leaving his red bag behind. The room was registered in the respondent's name. The respondent decided to stay on in the hotel.

The learned judge pointed out that the learned President found that the black pair of trousers in the red bag was the type usual worn by exponents of the Malay art of self-defence. This finding, the learned judge thought, was consistent with the evidence of the investigating officer who said the pair of black trousers was like a bersilat trousers. The learned judge considered that the learned President had made the right finding of facts but that he was wrong to say, in view of his finding that the red bag belonged to Hassan, that the presumption under section 37(d) of the said Act had not been rebutted.

In dealing with the word "possession", the learned judge referred to the oft-cited case of *Toh Ah Loh and Mak Thim* v. *R.*[1] where Gordon-Smith Ag. C.J. stated:

> "... Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing..."

He also cited *Chan Pean Leon* v. *Public Prosecutor*[2] and *Public Prosecutor* v. *Ang Boon Foo*[3] in support. He was of the view that the red bag and its contents were owned by Hassan and that the appellant had no power of disposal of the red bag or its contents as it did not belong to him. Consequently, he held that the presumption under section 37(d) had been rebutted. It seems clear Hassan did not know of the respondent's arrest, otherwise he would not have returned to the room.

The applicant contended that *Toh Ah Loh and Mak Thim* v. *R.*[1] was concerned with a charge of unlawful possession of ammunition under the Firearms and Ammunition (Unlawful Possession) Ordinance 1946. It does not apply to cases involving dangerous drugs. One has to look at the particular statute. In support, he referred to *Leow Nghee Lim* v. *R.*[4] where Taylor J. said at p. 30:

> "A number of cases were cited and I have since consulted some others. I do not propose to go through them. It is clear that they conflict and it is therefore necessary to go back to first principles. I must, however, comment on the misuse which has been made of the *dictum* in *Mak Thim.*[1] There the court specified certain characteristics without which, they said, (except by statute) possession cannot be criminal. The words in brackets are vital. They were deliberately inserted to show that the ruling is not applicable where the meaning of the word 'possession' is controlled by the particular statute..."

So much has been said about section 37(d) of the Dangerous Drugs Act it would be better to set it out in full. It reads:

> "37. In all proceedings under this Act or any regulation made thereunder –
>
> ...
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;"

It is the submission of the applicant that the power of disposal is not an essential ingredient in a dangerous drug case.

Although on the particular facts of the case we consider the learned judge right to allow the appeal, we are of the view that he was wrong to say that the accused must have the power of disposal to support the conviction. For instance, a person stole a dangerous drug knowing the thing he was stealing was a dangerous drug, legally he would have no power to dispose of it. If he was arrested by the police while in possession of the stolen dangerous drug he could successfully be charged under the Dangerous Drugs Act with possession of it and he would even be convicted of trafficking if the amount of the drug in his possession was sufficient for the charge of trafficking, although he had no power to dispose of it.

The accused said that he did not know there were drugs in the red bag. It was not in dispute that although the room was registered in his name

he shared it with his Malay friend. Both the lower courts took the view that the red bag in fact belonged to his Malay friend. However, in his grounds of decision, the learned President dealt with the non-knowledge briefly and stated:

"Beyond the point that he did not own the bag, the accused's claim that the bag was given to him, the contents of which he was completely unaware of, remains a bare assertion of one of many possibilities."

In fact, it was not a mere bare assertion that the learned President had to consider. Certain factors tend to support the accused's assertion. First, before the accused opened the door of his room the police knocked on the door and made known that they were the police. If the accused had known of the presence of the drug in the bag, he would have thrown the bag out of the window. Secondly, the evidence of the presence of the Malay dress in the bag tends to show that the bag belonged to his Malay friend, and this in turn tends to support his assertion that he did not know the contents of the bag since the bag did not belong to him.

It is a matter of grave doubt whether on the totality of the evidence the prosecution has established that the accused had custody and control of the drug found in the bag. The benefit of the doubt should have been decided in favour of the accused. In his grounds of decision, the learned President did not give sufficient consideration, or gave no consideration at all, to the factors mentioned earlier, but merely brushed aside the defence of non-knowledge. In our view, the failure on the part of the learned President had occasioned injustice. The learned judge was right to quash the conviction and the sentence.

More than one hundred and thirty years ago, in the case of *R.* v. *Smith,*[5] Chief Justice Erle referred to possession as that "vaguest of all vague terms". That that difficulty still persists is clearly shown in the number of cases cited in this reference. For reasons given we would answer the question in the negative.

Order accordingly.

Solicitors: *Phang & Co.*

COLD STORAGE (MALAYSIA) BHD. v. PEMUNGUT DUTI SETEM

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) 14 July 1987 & 2 February 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 23 of 1987]

Revenue Law – Stamp duty – Scheme of reconstruction and amalgamation – New Economic Policy of government – Exemption from duty – Conditions to be complied with – Stamp Duty Ordinance 1949, s. 15(1).

Cold Storage Holdings PLC (PLC) was a company incorporated in England and originally held 100% of Cold Storage (Malaysia) Bhd. (the appellant) and Fima Supermarkets Malaysia Berhad (FSMB), both of which were incorporated in Malaysia. In response to the New Economic Policy of the government of Malaysia, PLC reduced its holding to: (a) 70% in the case of FSMB (30% being sold to Kumpulan Fima); (b) 65% in the appellant.

Subsequently, PLC decided to go further and proposed a scheme whereby (a) the appellant would take over all the issued share capital of FSMB from PLC and Kumpulan Fima in exchange for shares in the appellant with no cash element (b) the issue of shares of the appellant is to be followed immediately by the sale of the shares for cash by PLC of approximately 25% and by Kumpulan Fima of approximately 4.6% of the enlarged issued share capital of the appellant to Pradaz Sdn. Bhd. (Pradaz), a wholly-owned Bumiputra company.

In implementing the reconstruction scheme, two documents (among others) were executed. By an agreement dated 28 January 1984, Kumpulan Fima Bhd. and PLC agreed to sell their holdings comprising 100% of the issued share capital of FSMB in exchange for 24,000,000 shares of the appellant, subject to the approval of the Foreign Investment Committee (FIC). By an agreement dated 13 April 1984, PLC agreed to sell shares in the appellant to Pradaz for cash subject to the agreement dated 28 January 1984 being effected and the approval of FIC.

The proposal was presented as a package for the approval of, and which was approved by, FIC as well as the Capital Issues Committee (CIC). Following upon the approval of FIC and CIC, the transfers relating to the 24,000,000 shares of FSMB were submitted to the respondent for adjudication. The respondent assessed stamp duty on the said transfers at $201,960. On a case stated to the High Court, the decision of the respondent was upheld. The appellant appealed.

Held, dismissing the appeal: (1) the learned judge was perfectly right to hold that all the conditions of section 15 of the Stamp Duty Ordinance 1949 must be complied with if a company were to be entitled to relief under that section. The learned judge held that because the sale of the shares of the appellant to Pradaz was for cash, the condition was not satisfied to entitle the appellant for exemption of duty;

(2) the agreement between PLC and Fima on the one part and the appellant on the other was clearly a scheme